

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

FRESNO UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2013010033

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FRESNO UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2012120631

**DECISION**

Administrative Law Judge (ALJ) Troy Taira, Office of Administrative Hearings (OAH), heard this matter in Fresno, California, on July 9-11, 16-17, and 22, 2013.

Student's Mother and Father (Parents) appeared on behalf of Student. Parents were present throughout the hearing. Student was not present at the hearing.

Sang-Jin Nam and Melody Hawkins, Attorneys at Law, appeared on behalf of Fresno Unified School District (District). District's attorneys were assisted by Diandra Netto, Attorney at Law, for much of the hearing. Christine Gunther, District psychologist, was present on behalf of District on July 9-11, 2013. Janet Trosper, Special Education Regional Instruction Manager (RIM), was present on behalf of District on July 16-17, 2013. Debbi Clark-Fleming, Special Education Director, was present on behalf of District on July 22, 2013.

District filed its due process hearing request (complaint) on December 17, 2012. Student filed his complaint on December 31, 2012. District's motion to consolidate the matters was granted on January 22, 2013, and all timelines applicable to OAH case number 2013010033 were ordered to apply to both matters. OAH granted a continuance on January 22, 2013. At the close of the hearing on July 22, 2013, the matter was continued to August 5,

2013, for the submission of closing briefs. The parties timely submitted their closing briefs on August 5, 2013, and the matter was submitted for decision.<sup>1</sup>

## PROCEDURAL MATTERS

### *Evidentiary Issues*

District Exhibits 50 through 57 consist of a news article, excerpts from transcripts from a previous due process hearing and the corresponding prehearing conference between Student and District, and recordings of Student's December 14, 2011, January 30, 2012, and February 14, 2012 individualized education program (IEP) team meetings.<sup>2</sup> District offered the exhibits as rebuttal evidence to show Mother's testimony at hearing is inconsistent with Parents' prior statements. Student objected as not timely disclosed since the exhibits were not in District's original exhibit binder. Exhibits 50 through 57 are relevant and probative to the issues, not cumulative, and are admitted into the record as prior inconsistent statements.

Student Exhibit 59 is a letter from Student's attorney to District's Superintendent on July 15, 2011, outlining Parents' concerns and their demands regarding Student's educational program. District objected to the exhibit as hearsay. The letter was referred to by District during its questioning of Mother and Parents corroborated the information in the letter. Student Exhibit 59 is relevant and probative to the issues, not cumulative, and is admitted into the record.

## ISSUES<sup>3</sup>

### *Student's Issues*

1. Whether District procedurally denied Student a free appropriate public education (FAPE) by denying the Parents their right to meaningfully participate in the IEP development process because:

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<sup>1</sup> To maintain a clear record, Student's brief has been marked as Student Exhibit S-65, and District's brief has been marked as District Exhibit D-58.

<sup>2</sup> Student's exhibits of the same IEP team meetings were also admitted into the record.

<sup>3</sup> These issues are those framed in the May 13, 2013 Order Following Prehearing Conference and as further clarified at hearing. The ALJ has reorganized the issues for this Decision.

- a. District failed to provide a copy of the Spring 2010 triennial assessment and a copy of the April 2010 triennial IEP prior to April 2011;
- b. District forged signatures of Sierra Charter School's staff on the April 2010 IEP, and improperly changed dates in Student's 2009 Sierra Charter School IEP document;
- c. District failed to have the regular educational teacher and school administrative personnel at the January and April 2010 IEP team meetings;
- d. District falsified the signature page on the January 2011 IEP by allowing the general education teacher and the guidance counselor who did not attend the IEP team meeting to sign the IEP document for attendance; and
- e. District failed to provide a copy of the January 2011 IEP prior to April 2011 and prior to requesting that parents sign the January 2011 IEP document?

#### *District's Issues*

2. Whether District's January 2012 triennial assessment and the April 2012 triennial addendum assessment of Student were appropriate?
3. Whether District's offer of placement and services contained in the June 12, 2012 IEP and the November 15, 2012 prior written notice (PWN) provides Student a FAPE in the least restrictive environment (LRE) so that District may implement the IEP without parental consent?

### PROPOSED RESOLUTIONS

Student seeks a finding that the April 2010 and January 2011 IEP's denied him a FAPE. Student requests an order that directs District develop an appropriate IEP that is designed to meet his unique needs in the areas of speech and language, behavior and personal safety, learning disorder - auditory processing and working memory deficits, academic deficiencies, and mental health. Student further requests that District be required to place him at Sierra Charter School with one-to-one instruction and supervision during the period before a new IEP is developed, among other proposed remedies.

District requests a finding that the triennial assessment and the triennial addendum assessment of Student were appropriate, that it offered Student a FAPE in the LRE, through its June 12, 2012 IEP and the November 15, 2012 PWN, and that District could implement the IEP and PWN offers without parental consent.

## CONTENTIONS OF THE PARTIES

Student asserts that District never provided him a FAPE and altered his IEP documents. Student states that District betrayed Parents' trust because they were ignorant of the laws. Student claims he did not get a copy of Student's April 19, 2010 IEP until April 2011 and requests OAH invalidate his IEP's from 2010 and 2011. Student asserts that District altered his IEP's to show signatures of team members who did not attend or sign the IEP. Student further asserts that a general education teacher did not attend the April 19, 2010 IEP team meeting as required. Student further claims that his deficits are greater than what District's assessments show.

District states Student's assertions that it illegally altered IEP documents are false and that the required members of the IEP team attended the meetings. District further states that its 2012 triennial assessments was appropriately conducted and placement offers in its June 2012 IEP are reasonable calculated to permit Student to make meaning progress in the LRE. District states that for the past two school years, Student has been attending a temporary community day school for expelled and suspended students, which does not meet his needs and is an inappropriate long term placement. District contends that Student is ready to return to a general education high school environment with RSP support in accordance with the June 2012 IEP.

## FACTUAL FINDINGS

### *Jurisdictional and Background*

1. Student is a 16-year-old boy who lives with adoptive Parents in Clovis. Much of Student's early history is unknown. He was removed from his biological mother when he was about two years old and spent his early years in numerous foster homes (up to 25). Parents adopted Student in 2007, when he was 10 years old. Student was first eligible for special education in 2002. Student attends school in the District pursuant to an inter-district transfer.

2. During the 2010-2011 school year, Student attended eighth grade at Ahwahnee Middle School (Ahwahnee) until he was suspended following a disciplinary incident in May 2011. During the 2011-2012 and 2012-2013 school years, Student was in ninth and tenth grade at Phoenix Secondary School (Phoenix), which is a community day school serving expelled and suspended students. Student was placed at Phoenix in October 2011 following a District expulsion action that began in May 2011.<sup>4</sup>

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<sup>4</sup> District's expulsion and its related proceedings are not a subject of this hearing. (*Student v. Fresno Unified School District* (April 16, 2012) Cal.Offc.Admin.Hrngs. 2012020842 and *Student v. Fresno Unified School District* (June 22, 2012) Cal.Offc.Admin.Hrngs. 2012020842.)

3. Student is eligible for special education and related services under the category of Other Health Impairment (OHI), primarily based on a medical diagnosis of attention deficit hyperactivity disorder (ADHD). His last agreed upon and implemented educational program is in his January 19, 2011 IEP. Student's last agreed upon IEP provides for four general education classes, two RSP classes, one in language arts and the other in math, and contains math reasoning and writing goals. The IEP does not provide for extended school year services or any other special education services.

#### *Statute of Limitations*

4. The issue of the statute of limitations was raised by District in its motion to dismiss on January 7, 2013, addressed in OAH's order of January 14, 2013, and discussed by the ALJ during the prehearing conference on May 13, 2013. Specifically, the issue is whether any of Student's claims, which allegedly occurred prior to December 31, 2010, are barred by the two-year statute of limitations.

5. The statute of limitations for due process complaints is two years. Exceptions to the statute of limitations are limited to cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required to be provided to the parent.

6. Mother testified that only the special education resource specialist program (RSP) representative and Parents attended the February and April 2010 IEP team meetings, but did not learn that the failure to have a general education teacher at the meeting was the basis for a legal claim until March 2012. The date a party discovers it has a basis for a legal claim is not an exception under the statute.

7. In addition, Parents asserted that District failed to provide a copy of the April 2010 IEP until Parents requested a copy in April 2011. The evidence at hearing established Parents' extensive involvement at all levels with Student's educational program.<sup>5</sup> Parents knew an IEP team meeting was held on April 2010 because Parents attended that meeting. The District did not withhold information about the meeting. Therefore, there is insufficient evidence to establish an exception to the statute of limitations. Accordingly, Student's claims which allegedly occurred prior to December 31, 2010, are barred by the two-year statute of limitations.

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<sup>5</sup> Student and District have previous and ongoing disputes that are not subject of this Decision.

*The IEP of January 19, 2011*

8. Procedural violations result in a denial of FAPE if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefit.

9. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. Additionally, parents are to receive a copy of the IEP document.

10. Student asserted that District falsified the signature page on the January 2011 IEP by allowing the general education teacher and the guidance counselor to sign the IEP document, even though they did not attend the IEP team meeting. Further, Student asserted that District failed to provide a copy of the January 2011 IEP prior to April 2011 and prior to requesting that parents sign the January 2011 IEP document. The District asserted that all required IEP team members attended and any confusion was caused by a paperwork mistake, and Parents received a copy of the IEP the following day on January 20, 2011.

11. Student attended eighth grade at Ahwahnee in January 2011. Richard Crowder was Student's RSP teacher and special education case manager.<sup>6</sup> Jennifer Bacon was guidance learning counselor (GLC) and testing coordinator at Ahwahnee.<sup>7</sup> Mr. Crowder and Ms. Bacon credibly established that they both attended the January 19, 2011 IEP team meeting along with Larry Glazebrook, the general education teacher, and Parents. Testimony from Mr. Crowder and Ms. Bacon, and review of the signature page of the IEP,

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<sup>6</sup> Mr. Crowder has been a RSP teacher for 21 years, four years at a district high school and 17 years at Ahwahnee. He has training in conducting and drafting IEP's and has attended more than 500 IEP team meetings. Mr. Crowder has a bachelor's degree in psychology and a master's degree in special education. He holds teaching, administrative, and counseling credentials. Mr. Crowder was Student's case manager and also taught him math and study skills classes. Mr. Crowder also coached Student in cross country and tennis. Mr. Crowder found Student to be an enthusiastic learner and very good in cross country and tennis. He also described Parents as very supportive.

<sup>7</sup> Ms. Bacon is currently a vice principal at another District middle school. She has been employed by District for 13 years and was a GLC since 2007 and at Ahwahnee from 2010 to 2011. As a GLC, Ms. Bacon attended IEP's as District's representative. Ms. Bacon has a bachelor's degree in arts history, a master's degree in education administration, and is a credentialed public school teacher.

established that Mr. Crowder, Ms. Bacon, Mr. Glazebrook, and Parents attended the meeting and signed the January 19, 2011 IEP.

12. Mr. Crowder used a document projector to show the IEP on a smart board during the January 19, 2011 meeting so that all the participants could review it. He made a copy of the IEP and gave it to Parents the following day. The evidence shows that the team reviewed the IEP and Parents participated in the meeting, expressing no objections as the meeting was positive overall. Mr. Crowder printed out the final signature page and the participants signed. Mr. Crowder sent Parents a copy of the IEP the day after the meeting in Student's folder on January 20, 2011.

13. There are a number of clerical errors in the IEP document. For example, the block for "triennial" is checked off when this was an annual IEP team meeting. The evidence at hearing showed these errors were administrative in nature due to District's staff inattention to detail and unfamiliarity with the software program used to generate the IEP document due to lack of training.

14. The evidence was unpersuasive in establishing that these errors were the result of attempts by District staff to forge documents or mislead Parents. Therefore, the evidence showed that the January 19, 2011 IEP team meeting was conducted with the required team members, in which Parents meaningfully participated and received a copy of the IEP document after the meeting.

#### *January 2012 Triennial Assessment*

15. A special education student must be reassessed at least once every three years or more frequently if conditions warrant, or if a parent or teacher requests an assessment. A school district's assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This may include information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible.

16. Parents objected to District's triennial assessment because other assessments and their observations show Student to have lower abilities than what District's assessments show. District asserted that the triennial assessment and the addendum were correctly done

by qualified staff with no discriminatory biases. District contended that the January 2012 triennial assessment and the April 2012 triennial addendum assessment of Student were appropriate.

17. District conducted Student's triennial assessment in January 2012 and an addendum assessment in April 2012. Dedar Gill, a District lead psychologist, conducted the assessment.<sup>8</sup> Parents consented to the comprehensive assessment plan. Participating in portions of the assessment were Christina Smith (special education teacher),<sup>9</sup> Misty Carlson (speech and language pathologist) (SLP), Natalie Turner (occupational therapist), and Barbara Haskins (school nurse). Virginia Hull (Phoenix science teacher),<sup>10</sup> Brian Radtke (Phoenix principal), and Parents provided input for the assessment.

18. Mr. Gill credibly established that he was experienced and qualified to administer these assessments, that they were done correctly using the proper protocols, the materials validated for the specific purpose for which they are used, and conducted in Student's language with no discriminatory biases. The assessment gathered relevant functional, developmental, and academic information about Student to develop his educational program.

19. Student's health assessments showed him to be overall healthy, passing school vision and hearing screenings. The school nurse noted Student was undersized for his age,

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<sup>8</sup> Mr. Gill has a bachelor's degree in psychology and sociology, and a master's degree in counseling and child school psychology. Mr. Gill is also an adjunct instructor for a master's degree program in school psychology. Mr. Gill is a credentialed California school psychologist and nationally certified by the National Association of School Psychologists. Mr. Gill has 15 years total experience as a school psychologist and has been a District psychologist since July 2000. For the past seven years, he has served as one of two lead psychologists over all of the 53 District school psychologists. Mr. Gill's duties include coordinating services, training, consultation with other school psychologists, mentoring new school psychologists and student interns, attending IEP team meetings, conducting psychological assessments, and presenting assessment results at IEP team meetings. Mr. Gill was a credible witness.

<sup>9</sup> Ms. Smith is a RSP teacher at Phoenix. She has a bachelor's degree in liberal studies and a master's in special education. She has credentials for mild to moderate, second language learner, and autism. Ms. Smith has been with District for 14 years, with five years as a RSP teacher. Ms. Smith is Student's special education case manager and provided credible testimony about his abilities and performance.

<sup>10</sup> Ms. Hull has a bachelor's degree in natural science and a teaching credential for earth science. She is the lead science teacher at Phoenix. Ms. Hull taught Student and provided credible testimony about Student's ability and performance.



but healthy nonetheless. The triennial assessment also incorporated input from Student's psychiatrist, Dr. David Fox, MD, at the Sullivan Center for Children. Mr. Gill spoke with Dr. Fox and reviewed his one-page diagnosis treating Student for dysthymia (sadness, anxiety). Student was treated for depression, which was managed with medication. He diagnosed Student with oppositional defiance disorder (ODD), which was not significant. Dr. Fox ruled out Asperger's, but concluded that Student needs support in social skills.

20. Mr. Gill conducted the assessment over six sessions to accommodate Student's schedule. In conducting the assessment, Mr. Gill reviewed Student's files including prior assessments, and observed Student in his classroom setting. Mr. Gill also interviewed Student, Parents, and school staff, and conducted a battery of standardized tests. The assessment included an intellectual assessment using the Kaufman Assessment Battery for Children – II (KABC-II); an achievement assessment using the Woodcock-Johnson Test of Achievement – III Normative Update (WJ-III NU Ach) and Gray Oral Reading (GORT-4); processing assessments using the Developmental Test Visual Motor Integration – sixth edition (VMI), Comprehensive Test of Phonological Processing (CTOPP), and Test of Word Reading Efficiency (TOWRE); adaptive behavior assessments using the Vineland-II Adaptive Behavior Scales (VABS-II); behavioral, emotional, and social assessments using the Behavior Assessment System for Children - second edition (BASC-2) rating scales and Connors-3 rating scales for Parents, teachers, and Student.

21. The KABC-II measures overall cognitive functioning and processing abilities. The test includes many subtests and is a nationally normed test, common for Student's age group. The test measures general intelligence, including short term memory, visual processing, learning ability, fluid reasoning, novel problem solving, acquired knowledge, and vocabulary. Student's overall score, his "IQ" in common terms, was 80, which is considered below average. A score of 70 is considered in the lower extreme, with a range of 70 to 85 considered below average. A score of 85-115 is considered average.

22. Student scored in the average range in all of the subtests except one. Student's short term memory score of 60 was in the lower extreme range showing a deficiency in short term memory. However, he was able to do tasks with repeated trials. This lower score pulled down his other subtest scores, which were in the average range, resulting in an overall below average score. Student's lower averages from prior assessments were consistent with his multiple unstable living environments. His average scores increased due to Student being in a more stable environment after his adoption into Parent's home. Therefore, KABC-II established that Student's scores reflected true abilities in the average range since the lower short term memory pulled his other scores down.<sup>11</sup>

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<sup>11</sup> Mr. Gill's findings are consistent with the increase of Student's IQ in prior assessments. (See *Student v. Fresno Unified School District* (April 16, 2012) Cal.Offc.Admin.Hrngs. 2012020842, pp. 5-7.)

23. The VABS-II used rating scales from Parents and two teachers to assess Student's adaptive behavior in communication, daily living skills, and socialization. Rating Scales came from Parents, his special education teacher Mrs. Smith and general education teacher Ms. Hull. Student averaged in the low to moderately low range of functioning. Scores in daily living skills from his teachers were generally consistently higher than Parent's scores. His general education teacher rated him higher as Student was in classroom with a larger group of general education students. His special education teacher rated lower since she only saw him interact in a small group with fewer peers. Overall, Student showed improvement from previous assessments, but still showed deficits in communication and socialization skills. This pattern of deficits in adaptive behavior is consistent with his ADHD.

24. The WJ-III assessed Student's achievement in reading, writing, math, oral language, and academic knowledge. Student's RSP teacher, Ms. Smith, administered this assessment, and Mr. Gill checked and verified that the test was done correctly. Student showed relative strength in math, and weakness in written expression. His written language scores were lower than other scores, consistent with previous reports, his ADHD, executive functioning and processing speed deficit. Student's overall achievement was in the low average range.

25. The GORT-4 measures reading rate, accuracy, fluency, and comprehension. Student scored average in reading rate, below average in accuracy, below average in fluency, and average in comprehension. His oral reading quotient, which is a combination of scores, rated him below average. Student reads slowly and inefficiently, but was able to gather the main ideas. Student showed improvement in his ability to read and comprehend text.

26. Student was assessed using the VMI to measure his fine motor processing ability. The VMI measures fine motor eye-hand coordination used for paper-pencil tasks. Student's overall score is 72, placing him in the well below average range and showing a relative weakness consistent with prior assessments.

27. CTOPP measured Student's phonological processing using three related reading skills: Phonological awareness, phonological memory, and rapid naming. Student's overall performance revealed that he continues to experience difficulty with some aspects of phonological processing. Student scored below average in phonological awareness. He scored very poor in phonological memory which is consistent with the KABC showing a deficit in short-term memory. He scored below average in rapid naming (short-term memory).

28. The TOWERE showed Student's ability to pronounce printed words accurately and fluently. Student's fluency was in the low average range, but his overall score was 78 placing him in the poor range. His scores were consistent with other fluency tests. Student made a number of mistakes, consistent with decoding deficits.

29. Mr. Gill used the BASC-2 rating scales to assess Student's social behavior. Mr. Gill used the rating scales from the same special and general education teachers, Ms. Hull and Mrs. Smith, for a consistent profile. Parents and Student also did rating scales for observed behaviors, internal and external behaviors. Overall, the scales showed a consistent theme of Student's deficits in establishing social relationships. Student rated himself with a clinically significant lower score in peer relationships. Parents' rating scales were generally consistent with teacher ratings. Parent ratings in aggression and conduct, anxiety, depression, and sanitation, have diminished over the past two years. Adaptive skills, atypicality, and withdrawal remain areas of need.

30. The Connors-3 rating scales used the same raters as the BASC-2 for consistency and measured Student's behaviors, including those relating to ADHD-like behavior and other similar disorders. Student's rating was consistent with the BASC-2. There were some differences with the teacher ratings in the BASC-2, consistent with Student's hyperactivity and impulsivity. Parent's ratings were different, they rated Student lower than Student and teacher ratings overall. This was consistent with the common dynamic of Student behaving better at school than at home. Overall, the ratings were consistent with Student's deficits in social skills and peer relationships.

31. Mr. Gill's overall conclusion was that Student had ADHD, was academically successful, had good attendance and had made significant progress overall with his adoptive parents. Mr. Gill concluded that Student was not intellectually disabled (ID). Student had attention deficit disorder and hyperactivity. He had learning deficits, but was not ID. Student continued to be eligible for special education in the category of OHI, but not SLD. Student did have a gap in his IQ or academic ability versus his achievement. However, it was not enough to place him in the ID category. Student had processing deficiencies (ADHD) and was performing close to his intellectual ability.

### *Speech and Language Assessment*

32. Ms. Carlson assessed Student for speech and language as part of the triennial assessment.<sup>12</sup> She determined that he had a mild to moderate expressive language disorder,

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<sup>12</sup> Ms. Carlson has a bachelor's and master's degree in communicative disorders. She holds three certifications: clinical rehabilitation services credential (state credential); licensed speech and language pathologist; certification of clinical competence from the American Speech Language Hearing Association (ASHA). Ms. Carlson has seven years with district as a SLP and was a SLP in private practice and another county of education. She has a total of 14 years' experience as a SLP, serving clients between three years and 27 years old. Ms. Carlson is currently on a speech support team serving as lead SLPs for 80 SLPs in the district, advising schools, providing support, and answering questions. She is currently assigned to schools, including Phoenix elementary. She attends between 15 and 20 IEP's per year, sharing assessment results. Ms. Carlson also delivers services two to three days per week. Ms. Carlson was a credible witness.

as well as a mild moderate pragmatic delay. The disorder appears to inhibit normal communication abilities and adversely affects Student's performance in social and academic settings. Ms. Carlson concluded that Student meets the eligibility criteria for language or speech disorder, specifically in the area of pragmatic language. Ms. Carlson was experienced and qualified to administer the assessment, it was done correctly using the proper protocols, the materials validated for the specific purpose for which used, and conducted in Student's language with no discriminatory biases. The assessment gathered relevant information about Student to develop his educational program.

#### *OT Assessment*

33. Ms. Turner assessed Student for OT.<sup>13</sup> Ms. Turner concluded that Student's visual perceptual skills overall were average with deficits in sequencing. Student's motor control was mixed and he benefited from a sensory diet such as therapy putty, chewing gum, or music. Ms. Turner recommended that a sensory diet be included in Student's OT and that OT be provided as a consultation model within his academic setting, i.e. in the classroom. Ms. Turner was experienced and qualified to administer the assessment, it was done correctly using the proper protocols, the materials validated for the specific purpose for which used, and conducted in Student's language with no discriminatory biases. The assessment gathered relevant information about Student to develop his educational program.

#### *April 2012 Assessment Addendum*

34. In March and April 2012, Mr. Gill administered an addendum assessment to determine if Student met eligibility under the education code for special education services under the category of autistic-like behaviors (ALB). Participating in portions of the assessment were Christina Smith (special education teacher), Misty Carlson (speech and language pathologist), Natalie Turner (occupational therapist), and Danella Barnes, adaptive physical education specialist (APE). The assessment did not diagnose whether Student had a medical condition or disorder.

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<sup>13</sup> Ms. Turner has a bachelor's degree in OT, and is licensed in California. She is also registered nationally. Ms. Turner has been a District occupational therapist for 11 years, with four years as a contract occupational therapist. Ms. Turner also worked with California Children Services as an independent contract occupational therapist. She was an occupational therapist with school, home health and skilled nursing facilities in another state. Ms. Turner has a total 28 years as an occupational therapist, from birth to seniors. Her current duties include evaluations, supervising three assistant occupational therapists, developing programs, attending IEP team meetings, determining eligibility, and delivering services. Ms. Turner did Student's OT assessment, plus an addendum at Parent's request for autistic-like behaviors. Ms. Turner was a credible witness.

35. The addendum assessment consisted of classroom and break observations, review of his prior triennial assessment, the Asperger's syndrome diagnostic scale (ASDS) with parent and teacher rating scales, and the Gilliam autism rating scale-second edition (GARS-2) with parent and teacher rating scales.

36. Student was making good progress at Phoenix. His citizenship was rated satisfactory to outstanding. Student maintained a 3.50 grade point average during the second quarter of 2011-2012 and increased to a 3.67 grade point average during the third quarter. Student was receiving special education services through the RSP. Student showed excellent attendance. Student had five classes, and the curriculum was not modified. His grades were not modified either.

37. The GARS-2 used the same raters, Parents and teachers Ms. Hull and Mrs. Smith. Parents showed a wide discrepancy from the teacher ratings. The Parents rating showed "very likely" Student had ALB while the teacher ratings showed "not likely." Student's behaviors at home were different from his behaviors in the school environment. The teachers did not see the same behaviors at school. The ASDS used the same raters, Parents and teachers, with consistent results. The Parents rating showed "likely" Student had ALB while the teacher ratings showed "very unlikely." In addition, ALB was not seen in previous assessments.

38. Ms. Carlson did a speech and language assessment for the addendum. Ms. Carlson found that Student showed a mild expressive and pragmatic language disorder. However, given significant delays in development prior to the last five to seven years before his adoption, it was difficult to determine whether the scores indicate the true disorder or a delay due to lack of exposure to appropriate language use. These delays appear to inhibit normal communication abilities and adversely affect Student's performance in social and academic settings. Ms. Carlson was qualified to administer the assessment and the test was administered correctly.

39. Ms. Turner did an OT assessment for the addendum. Ms. Turner found that Student did not require school-based OT as a designated instructional service to access his curriculum. She suggested collaboration OT for sensory accommodations to assist Student to better access this curriculum. Ms. Turner used a school-based assessment, Sensory Profile School Companion Teacher Questionnaire and Self Questionnaire. Ms. Turner was qualified to administer the assessment and the test was administered correctly.

40. Danella Barnes conducted an APE assessment for the addendum.<sup>14</sup> Ms. Barnes met and interacted with Student and did two assessments, the Adapted Physical Education Scales II (APEAS) and Brockport Physical Fitness Test. The APEAS is a secondary tool for junior high and high school students and is more age appropriate. The Brockport uses school fitness test scores. Ms. Barnes was experienced and qualified to administer the assessment, it was done correctly using the proper protocols, the materials validated for the specific purpose for which used, and conducted in Student's language with no discriminatory biases. The assessment gathered relevant information about Student in order to develop his educational program.

41. APE strives for success in general education PE setting. APE uses modification, consultation, and one-to-one assistance. APE is more appropriate for students with multiple disabilities, visual impairments, in a wheelchair, or neural problems. Students in APE progress towards grade level standards. Despite lower scores in some areas, Student can succeed in grade level general education PE. Student did not qualify for APE under either the APEAS or the Brockport.

42. A student is eligible for special education and related services if among other things, he exhibits any combination of ALB: An inability to use oral language for appropriate communication; a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; an obsession to maintain sameness; extreme preoccupation with objects or inappropriate use of objects or both; extreme resistance to controls; displays peculiar motoric mannerisms and motility patterns; self-stimulating, ritualistic behavior. Based on the addendum assessment results, Student did not meet the education code criteria for ALB because he did not demonstrate significant enough deficits in any of the categories.

#### *Parents' Assessments*

43. Parent's evidence to discredit the District's assessment findings or the appropriateness of the testing was unpersuasive. Parents referred to the report from the Boone Fetter clinic at Children's Hospital Los Angeles where Student was assessed in February and November 2012. Parents asserted this report showed Student's abilities are at a lower level than what District's assessments show. The Boone Fetter report also used a variety of assessments, review of Student's records, and rating scales. Student was assessed

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<sup>14</sup> Ms. Barnes has a bachelor's degree in physical education (PE) teaching with an APE emphasis, and a master's degree in education. She has general PE and APE credentials. Ms. Barnes has been with District for three and a half years as an APE teacher. Prior to District, she taught APE for two and a half years at another school district, before moving up to be district coordinator for elementary school PE. In addition, Ms. Barnes has been an adjunct kinesiology instructor in a teacher preparation college program for five years. Ms. Barnes was a credible witness.

with the Wechsler Intelligence Scales for Children, Fourth Edition (WISC-IV); Autism Diagnostic Observation Schedule (ADOS); Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF); Goldman Fristoe Test of Articulation-2; and the Beery Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (Beery VMI).

44. Student's intellectual functioning as measured by the WISC-IV showed significant discrepancy between his verbal skills (73 IQ) and his non-verbal abilities (90 IQ), indicating near-age perceptual reasoning with significant verbal comprehension delay when compared to other students of his age group. Student was assessed again on November 26, 2012, and showed a similar discrepancy with his verbal skills (67 IQ) and his perceptual reasoning (92 IQ). His overall IQ score of 72 indicated an overall performance significantly below average, and showing Student to be in the borderline intellectual functioning category.

45. The report measured Student's social emotional development which showed deficits in his communication and social interactions, but concluded he did not meet the criteria for autism spectrum disorder. The Boone Fetter report also reviewed District's OT assessment of January 30, 2012 and did not conduct a separate OT assessment. The report's recommendation for OT consultation in the classroom was consistent with District's OT assessment. The Beery VMI showed Student in the overall low range for visual motor integration skills with below average visual perception and average fine motor coordination, otherwise consistent with District's OT assessment.

46. The CELF showed Student's ability to comprehend spoken language and his overall auditory processing skills to be in the moderate to severely delayed range. Student's expressive language ability in vocabulary, sentence structure, and use of social language was severely delayed. The Goldman Fristoe test measured Student's articulation skills to be in the moderately delayed range. In addition, Parents asserted that a speech and language evaluation done at California State University – Fresno's Speech, Language, and Hearing Clinic on February 22, 2013, also showed Student had a severe receptive-expressive language disorder, performing at a lower level than what District's assessments show.

47. What is germane to this decision is that while the reports showed Student to be overall lower functioning than District's assessments, the reports were not so dissimilar from District's assessments to find that its assessments were inadequate. The reports concluded that Student has communication and related social skills deficits. In addition, there was no direct testimony to the findings of the Boone Fetter reports or the California State University report. Finally, the Boone Fetter assessments were consistent with District's assessments in that they find that Student is able to attend general education with RSP support. Therefore, the reports were given less weight.

48. Accordingly, the triennial assessment and the addendum were conducted by District staff experienced and qualified to administer these assessments, that they were done correctly using the proper protocols, the materials validated for the specific purpose for which they are used, and conducted in Student's language with no discriminatory biases. The assessment gathered relevant functional, developmental, and academic information

about Student in order to develop his educational program. There was insufficient evidence to discredit District's assessments. Therefore, District's January 2012 triennial assessment and the April 2012 triennial addendum assessment of Student were appropriate.

#### *The IEP of June 12, 2012*

##### *Procedural Validity of the IEP*

49. District held the annual and triennial IEP team meeting on June 12, 2012. Parents attended the meeting. The following District members attended: Brian Radtke (local educational agency representative), Ms. Hull (GE teacher), Ms. Smith (SE teacher, RSP), Ms. Carlson SLP, Ms. Turner (occupational therapist), Mr. Gill, Julia Picher (school psychologist), Diane Torna (health director), Ms. Barnes APE, and Janet Trosper (regional instructional manager)(RIM). Student did not attend the meeting. The required team members attended the June 12, 2012 IEP team meeting.

50. Ms. Trosper chaired the meeting.<sup>15</sup> The team reviewed assessment reports and the draft IEP. The following reports were presented and discussed: APE, OT, speech and language, health, and psychoeducational. The triennial assessments and the addendum reports were presented and discussed. In addition, the team reviewed and considered an independent evaluation report provided by Parents.<sup>16</sup> Parents participated in the meeting, expressing their opinions. The evidence showed that the June 12, 2012 IEP team meeting met the procedural requirements set forth in the IDEA, District conducted a properly held team meeting with the required team members and Parents meaningfully participated.

##### *Substantive Validity of the IEP*

51. A district must provide a student with an educational program that is reasonably calculated to provide the student with some educational benefit in the LRE. A district is not required to provide a special education student with the best education available or to provide instruction or services that maximize a student's abilities. A school

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<sup>15</sup> Ms. Trosper has a bachelor's degree in communicative disorders and credentials in administration, kindergarten through grade 12 (multiple subjects), and deaf and hard of hearing. Ms. Trosper has been a RIM for 24 years. Prior to that, she was a SE teacher for severe learning disorders (SLD). Her RIM duties include serving 10 schools, with students ranging from preschool to adult, serving as main liaison between District special education division and school sites. She ensures students get placement and services, and attends IEP team meetings that are complex or contentious, or at parent or teacher request. Ms. Trosper was a credible witness.

<sup>16</sup> Parents provide the team a copy of the Boone Fetter clinic at Children's Hospital Los Angeles done in February 2012, discussed above.



district need only provide a basic floor of opportunity that consists of access to specialized instructional and related services, which are individually designed to provide an educational benefit to the student.

#### *District's Offer*

52. The IEP that resulted from the June 12, 2012 IEP team meeting places Student in general education high school for the 2012-2013 school year. Student's primary disability category is OHI and his secondary category is speech or language impairment (SLI). Student would receive specialized academic instruction for 100 minutes daily (RSP support) in language arts and math class. Student would receive OT for 15 minutes per month on a consultation and collaboration model with direct service to determine sensory diet needs. Student would get speech and language support for 30 minutes per week consisting of SLP collaboration with school staff, classroom instruction, and pull-out session to build and reinforce strategies for his communication deficits. Student would also receive individual counseling from the school psychologist, including consultation with staff to support social skills development.<sup>17</sup>

53. The IEP contains accommodations and modifications to assist Student in the classroom and during the standard statewide assessment tests. The IEP also contains a transition plan to help prepare Student for post high school. Parents did not consent to the IEP and left the meeting prior to its conclusion.

#### *Determination of Student's Unique Needs and Present Levels of Performance*

54. The IDEA provides that an IEP must contain a statement of the current levels of educational performance, measurable annual goals, and a means to measure progress towards the goals. Additionally, the IEP team must take into account the results of the student's most recent assessments in formulating the IEP to determine the student's present levels of performance and the student's unique needs.

55. At the meeting, the team reviewed the psychoeducational evaluations, OT, speech and language, and APE reports discussed above. Mr. Gill, Ms. Turner, Ms. Carlson, and Ms. Barnes all testified credibly about their assessments of Student. In addition, the other District team members Ms. Hull and Mr. Smith worked with Student on a regular basis at school.

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<sup>17</sup> The IEP did not offer extended school year (ESY). The assessments, IEP, and witness testimony establish that ESY was not needed. Parents requested ESY at the IEP team meeting, but did not contest the absence of an ESY offer at hearing. Accordingly, ESY is not discussed in this decision.

### *Academic Skills*

56. In reading, Student could read eighth-grade text, but had difficulty understanding what he reads and would struggle answering comprehension questions. Through informal assessment, his estimated independent reading level was at the end of fifth grade. His instructional level was at sixth grade. Student could summarize, make inferences, and predictions with teacher assistance during discussions involving literature.

57. In writing, Student could write on topic and answer questions in written form. He could summarize information and construct a paragraph with a topic sentence, supporting sentences, and a conclusion. He mainly wrote simple sentences that did not include a lot of detail. He used proper mechanics, but had spelling errors. Student needed guided assistance editing and revising his writing.

58. In math, Student could add, subtract, multiply, and divide single and multiple digit numbers. He could solve fractions. Student could convert fractions, decimals, percentages, mixed numbers, and solve problems involving exponents. Student was learning how to solve algebraic equations.

### *Communication Skills*

59. Student could communicate orally on topic and ask appropriate questions. He could learn and recall concrete information, but struggled with generalized information that had not been previously presented. Sometimes Student was hard to understand when he was speaking faster, when upset, or frustrated. Student could communicate his written thoughts and write his answers on topic.

60. Student could understand one or two-step directions orally. Multistep directions involving three or more steps were more difficult. Oral directions needed to be clear and precise, often requiring clarification to assess his understanding. Student was capable of asking for clarification when needed.

### *Gross and Fine Motor Development*

61. Student could walk, run, hop, jump, catch and throw a ball. He was acquiring the skills needed to access organized sports and PE at school. For his fine motor skills, Student could cut, draw, and handle small objects. His handwriting was legible, although sloppy at times.

### *Social Emotional and Behavioral*

62. Student was polite and kind. He demonstrated a respectful attitude. He was more comfortable around adults. He was beginning to feel more comfortable around his peers. He generally kept to himself during class and quietly completed his work. During

unstructured times on field trips and outside of class, Student was learning to interact appropriately with his peers.

#### *Adaptive and Daily Living Skills*

63. Student was punctual to class, showed good attendance, and was able to follow school rules. Student navigated well on campus, taking care of all his personal needs and came to school well groomed and appropriately dressed.

#### *Health*

64. Student was healthy and small for his age. Student wore glasses and otherwise had normal vision and hearing. The medical report from Dr. Fox, MD, listed his treatment for ADHD, dysthymia, obsessive-compulsive disorder, and oppositional defiant disorder.

65. The overall performance determinations showed that Student had made significant progress and was a successful student overall. He had deficits in verbal and written communication, and social skills, consistent with previous reports, his ADHD, executive functioning, and processing speed. District properly determined Student's present levels of performance and needs through Student's grades and test scores, teacher observation, and its own assessments. Parents failed to present evidence to the contrary. The evidence established that District accurately determined Student's present levels of performance as impacted by his ADHD, executive functioning, and processing speed.

66. Based on Student's performance levels, District properly identified Student's academic, and social and emotional needs to be addressed for Student to receive educational benefit. The IEP identified the following areas of need: written expression, math reasoning, sequencing and organizing math information, auditory short term memory and attention, oral language development, social language development, and OT. There was no evidence to the contrary.

#### *Goals*

67. Based on Student's needs and performance levels, the IEP team developed seven goals to improve Student's skills in his areas of need. The goals included written expression, math reasoning, sequencing and organizing math information, speech language development, attention and auditory short term memory, counseling for social skills, and sensory processing. The evidence established that the goals and objectives in the June 12, 2012 IEP were measurable and designed to address Student's identified areas of need. There was no evidence to the contrary. Therefore, the goals met Student's educational needs.

#### *Related Services*

68. An IEP must also contain related services when needed to enable the student to benefit fully from instruction such as developmental, corrective, and other supportive

services. Counseling, occupational therapy, physical therapy, transportation, and other services are examples of what may be required to assist a child to benefit from special education.

69. The June 12, 2012 IEP offers Student individual OT for 15 minutes per month in the form of consultation and collaboration with staff and occasional direct service to determine sensory diet needs, consistent with Ms. Turner's OT assessments and testimony. The IEP also offers Student individual speech and language therapy for 30 minutes per week consisting of collaboration with staff, classroom instruction, and pull-out sessions to build and reinforce strategies for communication deficits, consistent with Ms. Carlson's speech and language assessments and her testimony. The IEP offered Student counseling for 30 minutes per month consisting of consultation with staff to support his social skills development, consistent with the psychoeducational assessments and witness testimony that Student needs to improve his social skills.

70. Parents requested a one-to-one aide to assist Student. Parents contend that Student cannot effectively self-advocate and communicate with others, which is consistent with their assertion of his lower functioning level and illustrated by an incident where Student was unable to tell his bus driver where he lived. Credible testimony from Ms. Smith, Mr. Gill, Ms. Trosper, Mark McAleenan (Phoenix Vice Principal),<sup>18</sup> and Ms. Hull, establish that Student is capable of navigating a regular high school campus, maintaining good behavior, and following the rules. He can self-advocate and communicate with adults. The evidence showed that Student does not need a one-to-one aide to access his education.

71. The related services offer met Student's needs to enable him to receive meaningful educational benefit. There was no indication of the need for other related services. Therefore, District's offer of related services was appropriate.

#### *Accommodations and Modifications*

72. An IEP must contain modifications that will be provided for a student so that he can advance toward attaining his annual goals and be involved and make progress in the regular education curriculum. It must also contain a statement of the accommodations that are necessary to measure his academic achievement and functional performance.

73. The IEP offers Student several accommodations and modification to address his deficits, including reduced or shortened assignments; note taking support; highlighted textbooks and notes; use of a calculator for math and science; access to a computer; repeated

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<sup>18</sup> Mr. McAleenan has a bachelor's degree in sociology and a master's degree in social work. He is a credentialed school counselor and administrator. He has been with District since 2002 and has extensive experience as a teacher, counselor, and social worker. Mr. McAleenan was familiar with Student and was a credible witness.

instructions; clarifying instructions; extended time to complete assignments; preferential seating near the teacher; sensory diet; and use of the planner. For standard statewide tests, the IEP offers Student testing in small groups; extra time on tests; testing individually; supervise breaks during tests. These accommodations and modifications were consistent with Student's unique needs as identified in the assessments and teacher observation for Student to receive meaningful educational benefit. Student had no other need for accommodations or modifications. District's offer of accommodations and modifications was appropriate.

### *Individual Transition Plan*

74. Beginning no later than the first IEP in effect when the child turns 16, or younger, if determined appropriate by the student's IEP team, and updated annually thereafter, a student's IEP must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. It must also include transition services (including courses of study) needed to assist the child in reaching those goals. Among other things, the transition plan must include exposure to vocational and community experiences, and, if appropriate, training in independent living skills.

75. Student's individual transition plan included his input as part of the planning process. Student indicated he was not sure what career path interested him, but that he wanted to attend college after working for two years after high school and is interested in working in retail or customer service. Student's transition plan goal for training or education was for Student to research three options for higher education, either vocational programs or colleges.

76. Student's postsecondary goal for employment had him researching three possible career options and learning the educational requirements and salary for the career. Student's postsecondary goal for independent living had Student using the salaries he researched to determine possible budgets that include utilities, transportation, toiletries, food, and entertainment as measured by a completed budget spreadsheet.

77. The transition plan stated that Student was on a diploma track with an anticipated graduation date of June 12, 2015, and included Student's coursework description, and the number of units completed and needed to graduate. The evidence established that the transition plan was sufficient to meet Student's needs in making a transition from high school to later education and employment.

### *Behavioral Interventions*

78. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, strategies, including positive behavioral interventions and supports, to address that behavior. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE.

79. Parents requested a behavior support plan (BSP) for Student's behaviors. The evidence at hearing established that Student had social skills deficits, but that Student was generally well behaved at school. The IEP provided appropriate strategies to specifically address his social deficits by offering services (counseling, speech and language therapy, and OT) and goals (counseling and sensory diet). In addition, credible and persuasive testimony from the IEP team members Ms. Smith (SE teacher, RSP), Mr. Gill, and Julia Picher (school psychologist)<sup>19</sup> established that Student did not need a BSP.

#### *Continuum of Placement Options and LRE*

80. School districts are required to ensure a variety of potential educational placements are available to special education students, including placements in general education classes, resource classes, special day classes, and certified non-public schools if appropriate. There is no requirement that every possible program option available in a school district be addressed at an IEP team meeting.

81. A special education student must be educated with non-disabled peers to the maximum extent appropriate, and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general education classes, with the use of supplementary aids and services, cannot be achieved satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers while still obtaining educational benefit. Whether a student is placed in the LRE requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive setting; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class, and (4) the costs of the less restrictive setting.<sup>20</sup>

82. The evidence showed that the IEP team considered a number of programs for Student, including general education, RSP, speech and language, OT, APE, and assistive technology. The IEP offered Student a general education high school setting with specialized RSP instruction for math and English. This was consistent with the assessments and witness testimony, which showed that Student required specialized instruction for math and English due to his deficits. Without the RSP support for math and English, Student may become frustrated and become a distraction to other students. Student would not make

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<sup>19</sup> Ms. Picher has a bachelor's and master's degree in social work. She is a credentialed school psychologist. Ms. Picher is assigned to Phoenix and assesses students for special education, does crisis response, assists special education staff members, group counseling, supervises PhD candidate interns, and attends IEP team meetings. Ms. Picher knows Student and was a credible witness.

<sup>20</sup> Neither District nor Student made any argument concerning the cost of the proposed placement. Therefore, that subject is not addressed here.

adequate progress in a full-time general education setting. The IEP also offered Student the opportunity to work on the necessary social skills and behaviors needed to appropriately interact with his peers in general education setting.

#### *Unsuitability of Student's Current Placement*

83. District asserted that Student's current placement at Phoenix is unsuitable due to his successful performance, the temporary nature of a community day school, and the lack of academic and extracurricular programs available to Student at Phoenix. However, OAH's order on January 22, 2013 granting Student's motion for stay put in this case found that Student's placement at Phoenix was created by District's expulsion against Student. By District's own expulsion terms, as long as Student does not reapply for admission into a general high school, Phoenix remains his placement. District's IEP of June 12, 2012 is not made more or less appropriate by where Student currently is. Therefore, the suitability of Student's placement at Phoenix is not an issue to be decided in this Decision and is not addressed.

#### *Placement Offer*

84. A coherent, formal, written offer is required to create a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child.

85. The IEP offers Student placement at one of four District high schools that could provide the services and supports Student requires (Hoover, Duncan, Sunnyside, or Edison). District offered Hoover High School as his homeschool since he attended Ahwahnee, a feeder school to Hoover. Hoover has approximately 1,700 students.

86. Also, on the list was Duncan High School. Duncan is the smallest high school with 985 students. Duncan has a resource program with two RSP teachers to support a general education class. Duncan is a magnet school because students must apply and be accepted to attend Duncan. It is considered a safer campus because of its small size.

87. Sunnyside High School is closest to Student's home. There are six RSP teachers and the total student body is 3,100 students, it is the largest district high school. The RSP study skills class supports the general education classes. For example, English study skills class is for the general education English class. Edison High School was also offered. The student body at Edison is 2,400 students. Parents rejected all of the placements either for reasons unrelated to the IEP services, either they didn't like an administrator or they didn't state a reason, and Student did not present evidence at hearing as to alternative placement that would meet Student's unique needs. Additionally, Parents' rejection of any District high school offer in the June 2012 IEP was due to the personal dispute Parents have with District, and not whether Student's special education needs could be met.

88. District's placement offer of the four schools was communicated in writing to Parents via the IEP, but typically a placement offer of four options lacks the required specificity to permit the parties to know what was being offered. In this case, District offered four separate schools as placement options and asked Parents to choose one, giving Parents the opportunity to visit the campuses. District asserted that each school had RSP teachers and could meet Student's needs.

89. However, there was insufficient evidence to show how these four schools were identical in what each offered, such that offering one was the same as offering the others. On the contrary, the schools were in different locations with markedly different characteristics. One was a small select magnet school with 985 students, while the other three were large general high schools ranging from 1,700 to 3,100 students. There was insufficient evidence to determine if and how the RSP programs were identical and how each school would have impacted Student's social skills deficits and needs given the wide differences in the size of the student body. In addition, evidence at hearing showed that Student would benefit from attending a smaller campus. As such, the four different schools varied in size, location, and characteristics to the extent that there was insufficient evidence to conclude that District offered a specific placement when it offered the four separate campuses.

*Prior Written Notice on November 15, 2012*

90. A district is required to provide written notice to the parents of the child whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

91. Federal and state law requires that parents must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student.

92. District sent Student a written notice on November 15, 2012, proposing to change Student's placement to his homeschool, Hoover High School, effective January 14, 2013, the start of the spring semester. District continued to offer three alternative placements at Duncan, Sunnyside, or Edison. District stated the reasons for the proposed placement and referenced the educational program offered in the IEP of June 12, 2012. District specifically rejected Parent's request for a 1:1 aide. The June 12, 2012 IEP, related assessments, and testimony at hearing established that Student did not require a one-to-one aide. The PWN also included an extensive four-week transition plan to help Student transition to the new school. Student did not present evidence at hearing to challenge the appropriateness of the PWN or that Parents did not understand the District's offer. As noted above, even if the PWN just contained one high school, Parents would have rejected the District's offer for personal, not educational reasons.



93. While the PWN provided written notice of a proposed change to Student's placement, District cannot use the PWN to bypass the requirement to hold an IEP team meeting. In this case, District changed its placement offer from four schools to one school (Hoover) and added an entirely new item, the extensive four-week transition plan. These proposals were not in the IEP of June 12, 2012. The overall effect was that the PWN changed District's placement offer in the IEP of June 12, 2012 without a corresponding IEP team meeting, which subsequently denied Parents participation in the development in Student's educational program.

## LEGAL CONCLUSIONS

### *Applicable Law*

#### *Burden of Proof*

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Student has the burden of persuasion for the issues raised in OAH case number 2013010033 (Student's Issues (a) through (c)). District has the burden of persuasion for the issues raised in OAH case number 2012120631 (District Issues (1) and (2)).

#### *Statute of Limitations*

2. The statute of limitations for due process complaints in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) However, title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required to be provided to the parent.

#### *Elements of a FAPE*

3. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

4. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require local education agencies to provide special education students the best education available, or to provide instruction or services

that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 949-954.)

5. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, there must be a determination of whether a district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. 176, 206-207.) Second, there must be a determination of whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. The Ninth Circuit has endorsed the "snapshot" rule, explaining that "... an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031 (*Fuhrman*), 1041).)

6. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. If the school district's program was designed to address student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if student's parent preferred another program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314; *Student v. Manhattan Beach Unified School District* (2007) Cal.Offc.Admin.Hrngs. Case No. 2006010204.)

### *Consequences of Procedural Violations*

7. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. 176, 205-206.) However, a procedural error does not automatically require a finding of a FAPE denial. A procedural violation results in the denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

8. The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. A district must provide a single specific offer of placement. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. One of the reasons for requiring a

formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether or not to accept the offer. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).)

### *Required Members of an IEP Team*

9. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

10. The regular education teacher shall, “to the extent appropriate,” participate in the development, review, and revision of the pupil’s IEP, including assisting in the determination of appropriate positive behavioral interventions and strategies for the pupil, and supplementary aids and services and program modifications or supports. (20 U.S.C. § 1414(d)(2)(C).)

11. The attendance of required IEP team members is excused if the parent and the school district consent in writing, and the IEP team member submit input in writing to the IEP team prior to the meeting. (20 U.S.C. § 1414(d)(1)(C).)

### *Parents’ Right to Participate in the Educational Decision-Making Process*

12. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882; *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. June 13, 2013) --- F.3d ---- 2013 WL 2631518; *Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003), 317 F.3d 1072, 1077.)

13. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1484.); *Fuhrman supra*, 993 F.2d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP team meeting, expresses her disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrman, supra*, at p. 1036.)

14. A district is required to provide written notice to the parents of the child whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. (20 U.S.C. §1415(b)(3); 34 C.F.R. § 300.503.) The notice must contain information pertaining to the program proposed and the reasons for the proposed change. (20 U.S.C. § 1415(c).)

#### *Requirements for Assessments*

15. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

16. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Under federal law, an assessment tool must "provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7).) In California, a test must be selected and administered to produce results "that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure . . . ." (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code §56320, subd. (c), (f).)

17. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. §1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).) An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

#### *ALB Eligibility*

18. A student is eligible in California for special education and related services if, among other things, he "exhibits any combination of the following autistic-like behaviors, to include but not limited to:

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.
- (4) Extreme preoccupation with objects or inappropriate use of objects or both.
- (5) Extreme resistance to controls.
- (6) Displays peculiar motoric mannerisms and motility patterns.
- (7) Self-stimulating, ritualistic behavior.
- (5) Cal. Code Regs., § 3030, subd. (g).)

### *Substantive Validity of the IEP*

#### *Student's Unique Needs and Present Levels of Performance*

19. An IEP must contain a statement of measurable annual goals related to “meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum” and “meeting each of the child's other educational needs that result from the child's disability.” (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

#### *Related Services*

20. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).)

#### *LRE*

21. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers “to the maximum extent appropriate,” and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general

education classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) (2006).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398 (*Rachel H.*), 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class; and (4) the costs of mainstreaming the student.

### *Determination of Issues*

#### *Student’s Issues*

*District failed to provide a copy of the Spring 2010 triennial assessment and a copy of the April 2010 triennial IEP prior to April 2011.*

*District forged signatures of Sierra Charter School’s staff on the April 2010 IEP, and improperly changed dates in Student’s 2009 Sierra Charter School IEP document.*

*District failed to have the regular educational teacher and school administrative personnel at the January and April 2010 IEP team meetings.*

22. In accordance with Factual Findings 4 through 7 and Legal Conclusions 2, Student’s Issues 1.a., 1.b., and 1.c., occurred prior to December 31, 2010 and are barred by the two-year statute of limitations and the limited exceptions do not apply in this case. Student asserts he did not learn that the failure to have a general education teacher at the meeting was the basis for a legal claim until March 2012, but this is not an exception under the statute. In addition, District did not withhold information. Therefore, there is insufficient evidence to establish an exception to the statute of limitations. Accordingly, Student’s claims which allegedly occurred prior to December 31, 2010, are barred by the two-year statute of limitations and Student’s Issues 1.a., 1.b., and 1.c. are dismissed and not discussed.

*District falsified the signature page on the January 2011 IEP by allowing the general education teacher and the guidance counselor who did not attend the IEP team meeting to sign the IEP document.*

*District failed to provide a copy of the January 2011 IEP prior to April 2011 and prior to requesting that parents sign the January 2011 IEP document.*

23. In accordance with Factual Findings 8 through 14 and Legal Conclusions 1 and 7 through 11, the required members were present at the IEP team meeting on January 19, 2011 and District provided Student with a copy of the IEP the day after the meeting. The

District attendees established their attendance at the IEP team meeting. Further, Student was unpersuasive that District failed to give Parents a copy of the IEP document as the evidence from District was more persuasive based upon credible testimony from Mr. Crowder and Ms. Bacon.

#### *District's Issues*

*Whether District's January 2012 triennial assessment and the April 2012 triennial addendum assessment of Student were appropriate?*

24. Pursuant to Factual Findings 15 through 48 and Legal Conclusions 1 and 15 through 18, District's January 2012 triennial assessment and April 2012 addendum met the legal requirements and were appropriate. The triennial assessment and the addendum was conducted by District staff experienced and qualified to administer these assessments, they were done correctly using the proper protocols, the materials validated for the specific purpose for which they are used, and conducted in Student's language with no discriminatory biases. The assessment gathered relevant functional, developmental, and academic information about Student in order to develop his educational program. Parent's evidence to discredit the District's assessment findings or the appropriateness of the testing was less persuasive and insufficient.

*Whether District's offer of placement and services contained in the June 2012 IEP and the November 15, 2012 PWN provides Student a FAPE in the LRE?*

25. Pursuant to Factual Findings 49 through 89 and Legal Conclusions 1, 3 through 8, and 19 through 21, District's June 2012 IEP did not meet the requirements of the IDEA. The IEP contains Student's current levels of educational performance, measurable annual goals in his areas of need, and a means to measure progress towards the goals. The IEP has related services to enable Student to benefit from his instruction. The IEP contains adequate accommodations and modifications so that Student can advance toward attaining his goals and progress in the regular education curriculum. The IEP also contains an adequate transition plan to help prepare Student for post high school. The IEP provides appropriate strategies to address his social deficits since Student did not need a BSP. The IEP considered an appropriate number of program options and the evidence shows that the offered program in a general education high school with RSP support is the LRE for Student to obtain an educational benefit.

26. However, District's written offer in the June 12, 2012 IEP was not sufficiently specific to permit Parents to know what was being offered. The four offered high schools varied so much in size, location, and characteristics that there was insufficient evidence to conclude that District offered a specific placement when it offered the four separate campuses. Under the totality of the circumstances, District's offer was not a single specific offer of placement and did not meet the standards set in *Union*.

27. Pursuant to Factual Findings 90 through 93 and Legal Conclusions 12 through 14, District's PWN of November 15, 2012 provided notice of a change of Student's placement, but changed its placement offer from four schools to one school and added an entirely new item, the extensive four-week transition plan. These proposals were not in the IEP of June 12, 2012. The overall effect was that the PWN changed District's placement offer in the IEP of June 12, 2012 without a corresponding IEP team meeting, which significantly impeded Parents the opportunity to participate in the decision-making process regarding the provision of a FAPE to their child.

28. Therefore, District's offer of placement and services from the IEP team meeting of June 12, 2012 fails to comply with the IDEA in that it does not offer a single specific offer of placement. The PWN of November 15, 2012 significantly impeded Parents' opportunity to participate in the decision-making process in the development of Student's educational program by changing his placement without an IEP team meeting. Parents did not like the educational program offered by District and continue to disagree with District, based on reasons unrelated to Student's educational program. However, the fundamental question for this issue is whether District offered Student a FAPE. Pursuant to Legal Conclusions 1 and 3 through 8, the evidence established that District's offer of placement and services contained in the June 2012 IEP and the November 15, 2012 PWN did not provide Student a FAPE.

#### ORDER

1. District's requests for relief are denied.
2. Student's requests for relief are denied.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on Issues one and two. Student prevailed on Issue three.



## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: August 29, 2013

/s/

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TROY K. TAIRA  
Administrative Law Judge  
Office of Administrative Hearings